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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1123

McEWEN MANUFACTURING COMPANY, - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, ET AL., - - - - - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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No. _____

McEWEN MANUFACTURING COMPANY, - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., - - - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner, McEwen Manufacturing Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 29, 1969.

OPINIONS BELOW.

The opinion of the Court of Appeals, which is not yet officially reported, is printed in the appendix to this Petition at pages 1a-6a. The judgment of the Court of Appeals is printed in the appendix hereto at pages 6a-7a. The decision and order of the National Labor Relations Board as issued July 3, 1968, is

printed in the appendix hereto at pages 8a-30a. The modification of its decision and order by the National Labor Relations Board, after petitions for review and enforcement had been filed, styled "Errata," is printed in the appendix hereto at pages 30a-31a. The decision and order of the National Labor Relations Board, including the Errata, is reported at 179 NLRB No. 99, 68 LRRM 1343. The Trial Examiner's decision and recommended order not officially reported, is printed in the appendix hereto at pages 32a-63a. The decision, order and direction of second election of the National Labor Relations Board, dated November 18, 1966, not officially reported, is printed in the appendix hereto at pages 64a-67a. The Regional Director's report on objections to the election, not officially reported, is printed in the appendix hereto at pages 68a-83a.

JURISDICTION.

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 29, 1969 (App., *infra,* p. 6a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 160(e) and (f).

QUESTIONS PRESENTED.

The questions here presented are:

1. May the National Labor Relations Board, having sustained objections filed on behalf of the labor organization to a consent election with results adverse to the labor organization and having ordered a second

election, upon refusal of the labor organization to participate in a second election, thereafter, following hearing upon an unfair practice charge upon the same alleged unfair labor practices which were the basis for setting aside the first election, direct the employer to recognize and bargain with the labor organization as the representative of the employees, based upon representation cards antedating the first election?

2. May the National Labor Relations Board, after having entered its decision and order which has been made the subject of petitions for review by the employer and the labor organization and which the Board has sought to enforce by cross-petition, then modify its order, without notice to the employer, so as to add to its decision and order findings that the employer did not act in good faith in denying representation to the labor organization and that the unlawful conduct of the employer made impossible the holding of a free election?

STATUTES INVOLVED.

The statutory provisions principally involved are Sections 7, 8(a)(1), 8(a)(5), 8(c), 9(a), 9(c)(1), 10(d), 10(e) and 10(f) of the National Labor Relations Act, as amended (29 U.S.C. 151, *et seq.*). Such statutory provisions are set forth in the appendix hereto at pages 83a-87a.

STATEMENT OF THE CASE.

This case commenced with the filing of a charge by the Amalgamated Clothing Workers of America, AFL-CIO (the "Union") with the National Labor Relations Board (the "Board") charging that McEwen Manufacturing Company (the "Company") had violated Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (the "Act"), by interfering with, threatening and coercing the employees of the Company in the exercise of their rights under Section 7 of the Act and by failing and refusing to bargain with the Union as the representative of the majority of the employees of the Company. The charge of failure to bargain was based upon the refusal to accede to a demand of the Union for recognition, upon the basis that the Union at that time had valid representation cards signed by the majority of the employees of the Company. Complaint was issued and a hearing was held before a Trial Examiner who found against the Company upon the Section 8(a)(1) violations, but found against the Board and the Union upon the charge of failure to recognize the Union and to bargain with the Union as the collective bargaining representative, finding that the Union did not have valid representation cards signed by a majority of the employees of the Company at the date of demand for recognition. Exceptions were filed by the parties resulting in a decision and order of the Board sustaining the Trial Examiner upon the Section 8(a)(1) alleged violations but overruling the Trial Examiner

upon the Section 8(a)(5) charge and finding that the Union at the time of the demand for recognition had valid representation cards signed by a majority of the employees of the Company on the payroll on May 28, 1966, the date of the demand for recognition.

The Union filed a petition for review because of the failure of the Board to sustain the position of the Union as to another respondent alleged to have constituted a single employer with McEwen. The Board filed a cross-petition for enforcement of its order. The Company in the meantime filed petitions for review in the United States Court of Appeals for the Sixth Circuit, which petitions were filed a few days after the petition was filed by the Union in the District of Columbia Circuit with the result that the petitions filed by the Company were transferred to the District of Columbia Circuit and were consolidated with the petition filed by the Union for disposition.

The petitioner herein seeks a review and reversal of the action of the Court of Appeals for the District of Columbia Circuit in enforcing the order of the Board.

The Company is a Tennessee corporation engaged in the manufacture of overalls and dungarees at McEwen, Tennessee. It is the largest industry in the town. On May 28, 1966 the Company had 172 production employees on its payroll. The Union sought to organize these employees.

1. *Union Organizational Activities.* The first organizational meeting of the Union was held on May 4, 1966 which was attended by fourteen or fifteen em-

ployees of the Company. The second organizational meeting was held on May 9, 1966 which was attended by about twenty employees of the Company. Cleron A. Smith, area director of the Union, spoke at both meetings. Company employees were requested to sign representation cards and to obtain signatures. At the May 9 meeting, in response to questions asked, Smith stated that the purpose of getting the cards signed was in order to have an election, and further, in response to a specific question, stated that persons signing cards did not have to vote for the Union even though they had signed cards, but he hoped that they would vote for the Union at the election. Individual employees, acting as organizers, obtained signatures of employees to cards upon representations (i) that they had to have so many cards signed in order to have an election and if an employee would sign a card the employee would not have to join the Union if the employee did not want to; (ii) that a certain percentage was needed in order to get an election; (iii) that the signatures of a majority were needed before they could have an election and if they did not get a majority signed they could not have an election; (iv) that an employee signing the card would not automatically be a member of the Union; and (v) that an employee signing a card could vote any way the employee wanted to vote at the election which was to be held.

2. *Union Demand for Recognition.* On May 28, 1966 the General Manager of the Company received a letter from the Union, dated May 24, 1966, demanding recognition. Believing that the Union did not repre-

sent a majority of the employees, the General Manager replied on May 31, 1966 expressing doubt as to the Union representation of a majority and refusing to recognize the Union and to meet for collective bargaining negotiations.

3. *Company Representation Petition.* Having heard nothing further from the Union after replying to the Union demand for recognition, the Company, through its counsel, on June 14, 1966, addressed a letter to the appropriate Regional Director transmitting in the usual form a representation petition filed by the Company as employer. This representation petition was filed and served on the Union on June 15, 1966. After the Company's petition had been served upon the Union, the Union made a second demand for recognition by letter dated June 21, 1966.

4. *Stipulation for Certification Upon Consent Election and Election.* On July 8, 1966, the Company and the Union entered into a "Stipulation for Certification Upon Consent Election." The appropriate collective bargaining unit was defined and the payroll period for eligibility was fixed as those employees on the payroll June 25, 1966. The date of the election was fixed as July 27, 1966. Pursuant to the stipulation, on July 14, 1966 the Company furnished to the Regional Director and the Regional Director furnished to the Union the names and addresses of all employees in the unit at the payroll period ending June 25, 1966. At the hearing before the Trial Examiner, which was the forerunner of the decision of the Board in this case directing the Company to recognize and bargain with

the Union, 109 representation cards were produced as having been signed by employees on the payroll on May 28, 1966, the date the recognition demand was received by McEwen. Seven of the persons named had voluntarily quit before May 28, 1966. Between May 28, 1966 and June 25, 1966, 8 of these employees terminated their employment voluntarily. On July 27, 1966, prior to the election on that date, a pre-election conference was held and the names of certain employees who had voluntarily terminated their employment between June 25, 1966 and July 27, 1966 were removed from the eligibility list. Of the 109 cards later used at the hearing as being employees on the payroll as of May 28, 1966 who had signed representation cards, 7 had quit before May 28, 1966, 8 had voluntarily terminated between May 28, 1966 and June 25, 1966, and 3 had voluntarily terminated their employment between June 25, 1966 and July 27, 1966. Thus, on the date of the election of July 27, 1966, of the alleged signers of 109 cards which were later offered to show a majority representation by the Union on May 28, 1966, 18 had voluntarily terminated their employment before the date of the election. As the result of these voluntary terminations and new hires, instead of 172 production employees, the Company on July 27, 1966, the date of the consent election, had 164 production employees. Of the 164 eligible voters 96 voted against the Union, 60 voted for the Union, 1 ballot was challenged, there were 3 void ballots and 4 persons did not vote.

5. *Objections to Conduct Affecting the Result of the Election.* The Union filed timely objections to

conduct affecting the result of the election. The objections were based: (i) upon the contents of a letter from the Company to all employees on or about July 14, 1966; (ii) the alleged statements of a supervisor on June 22, 1966; (iii) the alleged wrongful discharge of an employee on July 11, 1966, and (iv) alleged surveillance of a Union meeting. The Union further contended that the letter of July 14, 1966 should be considered in context with the speech by the Company President on June 3 or 4, 1966, and also in context with alleged threats by supervisors on June 7, 8 and 13, 1966. The Regional Director included in his study of the objections a speech of the Company President on July 26, 1966. Upon consideration of the letter of July 14, and the speech of July 26, the Regional Director found that the Company thereby created an atmosphere of fear in which the free expression of choice of the employees was rendered impossible. The first objection to the Union was sustained. The other objections were overruled. Having recommended that objection No. 1 be sustained, the Regional Director further recommended that the election of July 27, 1966 be set aside and a new election be directed.

6. *Decision and Order of Board Directing Second Election.* The Company filed exceptions to the Regional Director's report. The Union filed exceptions conditioned on the Board overruling the Regional Director's recommendation. The Board, through a panel composed of members Fanning, Brown and Zagoria, on November 18, 1966, adopted the Regional Director's findings and recommendation with regard to

Union objection No. 1, and directed a second election without passing upon the Regional Director's findings and recommendations with respect to objection No. 2.

7. *Union Refusal to Participate in Second Election.* The Union refused to participate in the second election ordered and directed by the Board. Instead, the Union on November 10, 1966, filed a charge alleging violations of Sections 8(a)(1) and 8(a)(5) of the Act. The Union claimed by virtue of certain representation cards, that it was the duly designated bargaining representative of a majority of the production and maintenance employees of the Company on May 28, 1966, the date that the Company refused to recognize and to bargain collectively with the Union. On November 23, 1966, the Union wrote the Regional Director stating that the Union could not authorize the Regional Director to proceed with the second election.

8. *Trial Examiner's Decision.* Complaint was issued on December 30, 1966, upon the charge filed by the Union on November 10, 1966, and hearings commenced on February 7, 1967. The Trial Examiner in his recommended decision referred to and quoted from the Regional Director's report of objections to the election as adopted by the Board, held that he was bound by the findings and legal conclusions of the Board in the representation case wherein the second election was ordered, and further held that the findings and conclusions of the Board sustaining objections to the election, also in the light of the record made before him, sustained the finding that the Company violated

Section 8(a)(1) of the Act by the President's speech on July 26, 1966, and the letter of July 14, 1966. The Trial Examiner further found that misconduct of supervisory employees in interviews of and statements made to employees constituted interference with, restraint and coercion of employees in the exercise of the rights guaranteed by Section 7 of the Act and the Company thereby violated Section 8(a)(1) of the Act. Upon the Section 8(a)(5) charge 109 cards were presented at the hearing by the General Counsel to show that the Union on May 28, 1966 had a majority status. The Trial Examiner excluded the 7 cards of employees who had terminated their employment before May 28, 1966 and excluded 2 other cards for reasons stated at the hearing. Upon consideration of the 100 cards which were admitted as seemingly valid cards, the Trial Examiner found that 14 of the cards were not valid representation cards, thereby destroying the claim of majority status by the Union.

9. *Decision and Order of the Board.* Exceptions were filed by all parties to the Trial Examiner's decision. The Board on July 3, 1968 issued its decision and order, agreeing with the Trial Examiner's conclusion, without adopting his rationale, that the Company had violated Section 8(a)(1) of the Act by the Company President's letter of July 14, 1966 and speech of July 26, 1966, and also agreeing with the Trial Examiner that the Company, through its supervisors, had violated Section 8(a)(1) of the Act by interrogation of the employees about their Union sympathies, threatening the employees with economic

reprisals if they selected the Union to represent them, and promising benefits if the employees refrained from supporting the Union. Contrary to the finding by the Trial Examiner, however, the Board found that the Union was entitled to recognition on May 28, 1966, and the Company's refusal to grant recognition and to bargain with the Union violated Section 8(a)(5) of the Act. In making this decision, the Board made no finding with reference to good faith or lack of good faith on the part of the Company in denying recognition, nor did the Board make any finding that the unlawful conduct of the Company made the holding of a free election impossible.

10. *Modification of Order by Board.* Within less than a week after the issuance of the Board order, the Union had filed its petition to review in the District of Columbia Circuit and the Company had filed its petition for review in the Sixth Circuit. The Board then filed its cross-petition for enforcement in the District of Columbia Circuit and the Company intervened in the District of Columbia Circuit. After these actions had been taken, the Board, without notice to the Company, added language to its order of August 15, 1968, in the form of a document described as Errata, modifying its decision and order by making substantial changes therein and adding language to the detriment of the Company without notice to the Company. In substance in its Errata the Board found and, without notice to the Company, added to its original decision and order the finding that the Company had not acted in good faith in refusing to recognize the Union, but

petitioned for a representation hearing acted in order to gain time within which to dissipate the Union's majority and thereby evaded its statutory obligation to recognize and bargain with the Union. The Board further found and added to its order that the finding that the unlawful conduct of the Company made impossible the holding of a free election and that consequently the Board had no alternative but to look to signed authorization cards as the only available proof of the choice the employees would have made absence the employer's unfair labor practices. The panel issuing the decision and order of the Board and later adding the Errata consisted of members McCulloch, Fanning and Brown. Two of these members had been members of the panel of the Board which on November 18, 1966 had held that, based upon substantially the same charges of unfair practices, the appropriate remedy would be the direction of a second election.

11. *Decision of Court of Appeals.* The Company filed its petitions for review of the order of the Board in the United States Court of Appeals for the Sixth Circuit, filing the first petition based upon the Board order of July 3, 1966, and filing its second petition based upon the insistence that by the addition of the Errata of August 15, 1968, the Board entered a new decision and order. Both petitions were filed after the Union had filed its petition for review in the District of Columbia Circuit. The Company's petitions were transferred to the District of Columbia Circuit and were consolidated with the Union petition for disposition. Under the issues made, the Company in-

sisted that: (i) there was no substantial evidence supporting the finding of the Section 8(a)(1) violations; (ii) the Company by refusing to recognize the Union on May 28, 1966 did not violate Section 8(a)(5) of the Act; (iii) the Union did not have valid representation cards executed by a majority of the employees of the Company on May 28, 1966; (iv) the Board having considered the alleged Section 8(a)(1) violations upon review of the Regional Director's report on objections and having determined that the appropriate remedy would be the direction of a second election could not thereafter require the Company to recognize and to bargain with the Union upon the basis of the representation cards relating to May 28, 1966; (v) the Company and the Union having stipulated and consented, with the approval of the Board, that the payroll as of June 25, 1966 should determine the eligibility date in connection with a consent election to determine representation, the Board could not thereafter return to the date of May 28, 1966 as the basis for determining majority representation by the Union; (vi) the Board having issued its decision and order on July 3, 1968, which had become the subject of petitions for review and cross-petition for enforcement, could not thereafter, without notice to the Company, materially modify such decision and order by making other findings to the prejudice of the Company and embodying them in the order.

In its opinion, the Court of Appeals held that: (i) there was substantial evidence supporting the finding of the Board that the letter and speech by the Com-

pany President which had been made the basis of the action setting aside the first election and ordering the second election, and the acts of interrogation and intimidation by Company supervisors violated Section 8(a)(1); (ii) such violations of Section 8(a)(1) served as a predicate for the Board's order to bargain under *NLRB* v. *Gissel Packing Company,* 395 US 575 (1969); (iii) the Board properly counted certain cards objected to by the Company in determining majority representation as of May 28, 1966; (iv) the Board properly concluded that the Union represented a majority of employees on May 28, 1966; (v) the Company had made a free election impossible; (vi) under *Gissel* the Board was justified in issuing an order to bargain; and (vii) the modification of the Board's order by adding the Errata did not prejudice the Company. The Court of Appeals denied the Company's petition to review and granted the Board's cross-application for enforcement.

REASONS FOR GRANTING THE WRIT.

The purpose of a representation proceeding, or of a hearing under a Section 8(a)(5) charge, is to determine whether the employees of an employer, while acting free from interference, coercion or intimidation by the employer or by the Union, and free from the influence of misrepresentations by either the employer or the Union, have expressed a free choice of a collective bargaining representative. It is the intent of the law that employees not be deprived of this free exercise of their right to select a collective bargaining

representative. It likewise is the intent of the law that there shall not be imposed upon the employees a collective bargaining representative who has not been freely designated by the majority of the employees in a bargaining unit. In this case the Union on May 28, 1966 advised the Company that it represented the majority of the employees of the Company as collective bargaining representative for collective bargaining purposes. The demand for recognition was not an unqualified demand. Among other things, the letter from the Union to the Company said:

> "We are prepared to prove our majority by submitting our authorization cards to a mutually agreeable third party, provided that under no circumstances will the names of those employees who signed cards be revealed."

Later at the hearing, when the 109 cards were presented, serious questions were raised as to the representations which were made to the employees when the cards were signed and some question was raised about some signatures. One card in particular did not bear a signature, but bore a printed name. When compared with the employee's W-2 form, there was no resemblance between the printed name and the signature. The Trial Examiner refused to consider this card. The individual whose name was printed on the card did not testify at the hearing. Another witness testified that she had seen the individual print his name on the card. This card was counted by the Board and this action of the Board was approved by the Court of Appeals. Let us assume, however, that this card had

been presented to this mutually agreeable third party, then the question arises, what would he have done with reference to whether he would have counted this card or would not have counted it. The mutually agreeable third party could not take evidence. He could only compare signatures on the card with signatures on the W-2 forms held by the employer. This is the type of evidence which the Board and the Court of Appeals have accepted as indicating a free choice of a collective bargaining representative. We have not gone into details with reference to objections to various other cards. *Gissel* precludes a discussion of the question of representations which were made at the time the cards were signed. Signatures or printed names obtained in the plant rest rooms, on the parking lots or in the Union meeting hall now have the same finality of decision as does the secret ballot behind the curtain, when the individual communes with himself alone.

There are questions raised in this case which were not presented in *Gissel*. We address ourselves to the two questions stated as being presented by this petition and the sub-issues arising thereunder:

A. The Union Should Not Have Been Certified as the Bargaining Representative on the Basis of the Representation Cards Antedating the First Election.

The first question presents the issue as stated in this caption.

1. THE UNION STIPULATED AND CONSENTED THAT JUNE 25, 1966 WAS THE PAYROLL ELIGIBILITY DATE RATHER THAN MAY 28, 1966.

After the Union made its demand for recognition, which was received by the Company on May 28, 1966, the Company filed a representation petition. The Union at that time had its choice of filing a charge that the Company had engaged in unfair practices, and had violated Section 8(a)(1) and 8(a)(5) by refusing to recognize the Union upon the demand of May 28, 1966. The Union chose, however, under date of July 8, 1966 to enter into a stipulation for certification upon consent election. The Union, with the approval of the Board, agreed in this stipulation the payroll eligibility date was June 25, 1966. It is shown in the record that a number of employees had terminated their employment voluntarily after having signed cards before May 28, 1966 and others had terminated their employment voluntarily before June 25, 1966. By agreement of the Union, approved by the Board, June 25, 1966 became the determinative date. The letter of the Company President of July 14, 1966 had not then been written and the Company President's speech of July 26, 1966 had not then been made. The dates of the alleged conversations between the Plant Manager and

two supervisors and certain employees which were later considered by the Trial Examiner as including Section 8(a)(1) violations, had passed. The failure to recognize the Union in response to the demand of May 28, 1966 had occurred. Despite these events the Union chose to enter into the consent election and chose to fix June 25, 1966 as the date to determine the question of representation. The date of May 28, 1966, therefore, was not and could not have been a determinative date for purposes of collective bargaining representation.

2. THE BOARD ELECTED THE REMEDY TO BE GRANTED THE UNION WHEN IN RESPONSE TO THE UNION'S OBJECTIONS TO THE ELECTION THE BOARD ORDERED A SECOND ELECTION.

The stipulation for certification upon consent election was entered into on July 8, 1966, and the election was held on July 27, 1966 pursuant thereto. The alleged unfair labor practices which occurred between July 8, 1966, the date of the stipulation, and July 27, 1966, the date of the election, were the letter of the President of the Company on July 14, 1966 and the speech of the President of the Company on July 26, 1966. The Union, with full knowledge of the alleged unfair labor practices which were said to have occurred in the form of interrogations, intimidation, threats and coercion, and the speech and the letter referred to, filed its objections to the election the details of which have been stated in the Statement of the Case. The Union relied upon the letter and the speech, one instance of alleged interrogation, an alleged discriminatory discharge and alleged surveillance. The Regional

Director sustained the Union with reference to the letter and the speech but ruled against the Union with reference to the alleged intimidation, threats and coercion, as well as in the matter of the alleged discriminatory discharge and alleged surveillance. The Union initiated this review by the Board by its objections to the election. The Union did not then file a charge of a Section 8(a)(5) violation. The Company excepted to the report of the Regional Director on objections. The Union excepted upon the possibility that the Company's exceptions might be sustained. Here again the Union had its choice of filing a charge of Section 8(a)(1) and Section 8(a)(5) violation, but the Union contented itself with maintaining its position with reference to obtaining a second election. The Board reviewed the Regional Director's report and approved the report. The Board had before it the letter and speech which are continuously referred to throughout this record as being Section 8(a)(1) and 8(a)(5) violations. The Board had before it the evidence with reference to the alleged unfair practice by interrogation by a supervisor. The Board directed a second election. The Union did not file a Section 8(a)(5) charge, nor did the Board order the Company to bargain with the Union. In *Gissel* this Court has said:

> "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that

> the possibility of erasing the effects of past practices and of insuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that the employees' sentiment once expressed through the cards would, on balance, be better protected by a bargaining order, then such an order should issue."

This Court has said, however, that there are other cases where the Board in the exercise of its remedial power will not grant a bargaining order. As this Court pointed out in *Gissel:*

> "We emphasize that under the Board's remedial power there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order."

The sense of *Gissel* seems to be that when a Section 8(a)(5) matter is presented to the Board and the issue is what the remedy shall be, the Board, upon finding that the past practices of the employer prevent a fair election, may direct that a bargaining order be issued. On the other hand, the Board may find that the unfair labor practices are of minimal impact and in such case not issue a bargaining order. In lieu of a bargaining order, the Board obviously may direct a second election.

The Board directed a second election in this case and having done so, it is submitted that the Board had exercised its remedial power as based upon the facts.

The Union refused to proceed with the second election and filed charges of Section 8(a)(1) violation and

Section 8(a)(5) violation. It was improper for the Board to grant a bargaining order under the complaint issued pursuant to this charge on the same facts upon which the Board had directed a second election.

3. THE UNION WAIVED THE SECTION 8(a)(5) CHARGE AND RELIEF THEREIN BY FILING OBJECTIONS TO THE ELECTION WITHOUT FILING A CHARGE OF SECTION 8(a)(5) VIOLATION.

The facts of this case are not parallel with either of the cases which are considered under *Gissel.* Here the Company, within two weeks after receiving the Union's demand for recognition filed an employer's representation petition, setting in motion the processes of the Board for determining representation. Of the cases which are reported under *Gissel,* General Steel Products, Inc., which was considered along with Gissel Packing Company, and Hecks, Inc., as No. 573, deserves most consideration.

For comparison of these cases, we quote from *Gissel* as follows:

> "In *Gissel,* where the employer's campaign began almost at the outset of the Union's organizational drive, the Union (petitioner in No. 691) did not seek an election, but instead filed three unfair labor practice charges against the employer, for refusing to bargain in violation of §8(a)(5), for coercion and intimidation of employees in violation of §8(a)(1), and for discharge of Union adherents in violation of §8(a)(3). In Heck's an election sought by the Union was never held because of nearly identical unfair labor practice

charges later filed by the Union as a result of the employer's antiunion campaign, initiated after the Union's recognition demand. And in General Steel, an election petitioned for by the Union and won by the employer was set aside by the Board because of the unfair labor practices committed by the employer in the pre-election period."

In *General Steel Products, Inc.,* 157 NLRB No. 59, 61 LRRM 1417, it appears that after the Union lost the election the Union filed objections to the election which were consolidated for hearing with the complaint case, wherein the Company was charged with Section 8(a)(1) and section 8(a)(5) violations. It does not appear that the objections to the election were disposed of other than in the complaint case.

In the fourth case considered under *Gissel, Sinclair Company,* No. 585 (164 NLRB No. 49, 65 LRRM 1087), the employer upon demand refused to recognize the Union. The Union filed a petition for an election. An election was ordered and held, resulting in the loss of the election by the Union by one vote. The Union then filed objections to the election and unfair labor practice charges which were consolidated for hearing before the Trial Examiner.

Possibly it is not particularly significant upon the question of the Section 8(a)(5) charge, but it should be pointed out that the Company in our case sought the services of the Board in determining the question of representation, whereas, neither of the companies considered under *Gissel* filed a representation petition.

Further, in *General Steel* and *Sinclair,* both decided under *Gissel,* the Union filed objections to the election and at the same time filed Section 8(a)(1) and Section 8(a)(5) charges, and the objections in both instances were consolidated with the charges and heard by the Trial Examiner. In the case now before the Court in this petition, the Union pursued its objections to the end and obtained an order from the Board directing a second election. This action constituted an election of remedies on the part of the Union and upon the part of the Board. When the second election was ordered, the remedial processes of the Board had been completed upon the question of refusal to bargain.

B. The Board Could Not Materially Modify Its Order Without Notice to the Company.

The Board issued its decision and order on July 3, 1968. As is pointed out in the note to the opinion of the Court of Appeals, the Board modified its order on August 15, 1969, after petitions for review had been filed by both the Union and the Company. This modification was without notice to the Company. The Court of Appeals found that this modification made a finding, which theretofore had not been made, to the effect that the Company had not acted in good faith when it refused to recognize the Union and filed a representation petition for the purpose of determining the representation question. This, it is submitted, was seriously to the prejudice of the Company. Further, in its modification of its order, the Board added a finding that the "unlawful conduct of the Company made

impossible the holding of a free election and that consequently the Board had no alternative but to look to signed authorization cards as the only available proof of the choice employees would have made absent the employer's unfair labor practice."

The Court of Appeals held that this finding did not prejudice the Company. In his report on objections to the election filed September 2, 1966, the Regional Director found that because of the letter of July 14, 1966 and the speech of July 26, 1966, "the employer created an atmosphere of fear in which the free expression of choice of the employee was rendered impossible." The Regional Director on this finding recommended a second election. The Board, by its decision, order and direction of second election issued November 18, 1966, adopted the Regional Director's findings and recommendations. The Board, however, apparently did not feel at that time that such a finding justified the conclusion that the Board had no alternative but to look to signed authorization cards as the only proof of the choice employees would have made absent the employer's unfair labor practices. The Board at that time upon the basis of the same finding with reference to the first election directed the holding of a second election. The incorporation of this finding into the order of July 3, 1968 as compelling a bargaining order was most prejudicial to the Company and wholly contradictory of the action of the Board in directing a second election.

Section 10(d) of the Act (29 U.S.C. 160(d)) is clear in its provisions:

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

The Board may modify the order *upon reasonable notice.* No notice was given the Company when the Board undertook to modify its order in the material particulars above stated almost a month after the order had been issued.

CONCLUSION.

For the reasons stated a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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